NO. 3437

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOZA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Arizona.

MESSRS. KIBBEY, BENNETT & JENCKES,
of Phoenix, Arizona,
Attorneys for Defendant in Error.

Filed this ..... 1920.

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Clerk U. S. Circuit Court of Appeals,
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Service of two copies of within brief of Defendant in Error is hereby acknowledged this.....

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Attorneys for Plaintiff in Error.

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MAY IT PLEASE THE COURT:

The Arizona Employers' Liability Act is, as stated by counsel for plaintiff in error, *sui generis*. It was passed in obedience to the mandate of the State Constitution as contained in Section 7, Article XVIII., set forth *hec verba* on page 60 of plaintiff in error's brief. It will be noticed that the terms of the Act contain restrictive provisions not called for by the Constitution. The Act limits the liability to injuries caused "by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment." The Constitutional mandate enjoins the passage of a law by the terms of which the employer "shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation." The words "arising out of and in the course of such labor," etc., are not

required by the Constitutional mandate to be inserted in the Act, and if they vary or restrict the requirement of the mandate, must be disregarded. The Supreme Court of Arizona in the case of Behringer vs. Inspiration Con. Copper Co., 17 Ariz. 232 (at page 235), deciding the question of the power of the legislature to enlarge the requirements of the constitutional mandate, said:

> "Before looking to what the legislature did or attempted to do under this command, we should determine what it had the power to do. The command to it was to pass a law 'by which compulsory compensation shall be required to be paid to any such workman' for 'personal injury to any such workman,' leaving it optional with the workman (employe) 'to settle for such compensation or retain the right to sue said employer as provided by this constitution.' The legislature is limited by this constitutional mandate to providing for payment of compensation to the workman in case he should elect to accept it. * * * *
>
> "We do not think the legislature possessed the power to enlarge the mandate of the constitution so as to impose on his heirs and dependents a remedy made by the constitution open to the workman only."
>
> Behringer vs. Inspiration Con. Copper Co., 17 Ariz. 232 (at p. 235), 149 Pac. 1065.

And in Deyo vs. Arizona Grading and Construction Co., 18 Ariz. 149 (at p. 155), the Supreme Court, in construing the rule laid down by it in the Behringer case, as above quoted, said:

> "If it (the legislature) may not enlarge the mandate so as to bring within its provisions persons not mentioned by the constitution, it would seem, upon reason, that the legislature is without

power to exclude from the benefits of the constitutional provision persons therein designated as beneficiaries."

To be sure in Arizona Eastern vs. Matthews, 180 Pac. 159 (at p. 163) the Arizona Supreme Court modifies the effect of its decision in the Deyo case with respect to the power of the legislature in enacting a law giving effect to the requirements of a constitutional mandate to limit the persons entitled to the benefits of the Act, but such modification cannot alter the effect of that decision when applied to the question raised here. For the Court goes on to say, approving its former ruling in the Behringer case, supra, "the legislature may not extend the constitutional provision so as to include subjects not within its purview or that conflict with it."

Arizona Eastern R. Co. vs. Matthews, 180 Pac. 159.

In including in the Employers' Liability Act the words, "Arising out of and in the course of such labor, service and employment," if such words are to be given the effect contended for by defendant in error, the legislature certainly injected a subject not within the purview of the constitutional provision and in conflict with it.

However, we do not regard these words as greatly changing the effect of the constitutional requirement, if at all, in view of the restriction contained in such requirement, i. e., "in all cases in which the death or injury of such employe shall not have been caused by the negligence of the employe killed or injured," which do not appear in any of the compensation acts. In other words, we believe that the words "due to a condition" etc., coupled with those contained in the clause, "in all cases in which the death or injury of such employe shall not have been caused by the negligence of

the employe killed or injured'' will produce the same results when construed in connection with industrial injuries as have been reached by the construction of the words ''arising out of and in the course of,'' etc. To make our meaning clearer we will designate these three phrases or clauses in the order in which they appear in the Arizona Employers' Liability Act, respectively, clauses ''A'', ''B'' and ''C''. The various compensation acts contain clause ''A'' only. Clause ''C'', with its salutary provision limiting the recovery to injuries not caused by the negligence of the employe killed or injured, is absent. But the courts and industrial commissions have been loath to allow compensation in cases where the injuries have been caused by the negligence of the injured persons, and so in considering, under compensation acts, cases of injuries produced by such negligence, even where strictly speaking they must have fallen into the category of accidents arising out of and in the course of the employment, it has been deemed expedient to put a forced construction upon the words and hold that such injuries did not so arise. This is aptly illustrated by the decision of the House of Lords in the British case of Plumb vs. Cobden Flour Mills Co., reported in 7 British Workmen's Compensation Cases at page 1, and also in 7 British Ruling Cases at page 128. In that case the workman Plumb was employed in stacking bundles of sacks. The work was ordinarily done by hand, but after the stack had reached the height of seven feet it was no longer possible to throw the sacks to the top of it. Plumb conceived the plan of raising them by means of a revolving shaft which ran along the ceiling for the purpose of transmitting power to another room. Being on top of the stack he passed a rope around the shaft, attached one end to a bundle, which was drawn up by the revolving shaft when tension was put upon the other end of the

rope. Plumb's arm became entangled in the rope and he was pulled over the shafting and injured. Generally speaking this would be classed as an accident which arose out of and in the course of his employment, but because the peril encountered was an added one caused by the conduct (misconduct, if you please), of the employe Plumb it was held that the accident did not so arise.

The necessity for arriving at such a conclusion has resulted in various definitions being given to the term embraced in clause "A". Thus we have the definition given by the Supreme Court of New Jersey in the case of Bryant vs. Fissel, reported in the 86 Atl. Rep. 458 (pp. 460-461): "For an accident to arise out of and in the course of the employment it must result from a risk *reasonably* incidental to the employment. * * * An accident arises in the course of the employment if it occurs while the employe is doing what a man so employed may *reasonably* do within a time during which he is employed and at a place where he may *reasonably* be during that time. * * * An accident arises out of the employment when it is something the risk of which might have been contemplated by a *reasonable* person when entering the employment as incidental to it."

And in Plumb vs. Cobden Flour Mills Co., supra, in referring to the decision in Craske vs. Wigan, 2 K. B. 635, Lord Dunedin says: "I think the point is very accurately expressed by the Master of the Rolls, * * * where he says: 'It is not enough for the applicant to say, "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further and must say, "The accident arose because of something I was doing in the course of my employment or

because I was exposed by the nature of my employment to some peculiar danger.'' ' ''

We have as yet had no adequate judicial definition of the term embodied in clause ''B''. Defendant in error places considerable reliance for such definition upon the decision in the case of Arizona Eastern R. Co. vs. Matthews, supra. But we are unable to gather anything from that case except the determination by the court that the particular accident causing Matthews' injury was not due to a condition or conditions of his employment because (1) the danger of falling into the scale pit was not peculiar to him in his occupation of bill clerk, and (2) because he was not engaged in a hazardous occupation within the statute.

As stated in the Matthews case, the words ''arising out of'' have been construed to refer to the origin or cause of the injury, and the words ''in the course of'' to refer to the time, place and circumstances under which it occurred. The conditions of any employment must be the circumstances surrounding the work incident thereto, including those of time and place, and any accident which is due to such conditions must necessarily be engendered thereby, or, in other words, arise therefrom. So we cannot distinguish any essential difference between the terms embodied in clauses ''A'' and ''B''. And the soundness of this reasoning seems to be supported by the action of the Arizona constitutional convention in purposely ignoring clause ''A'' in promulgating the constitutional mandate relating to the Employers' Liability Act and embodying therein the entirely new term represented by clause ''B'' coupled with the restriction as to negligence embodied in clause ''C''. The convention no doubt had before it the numerous compensation acts when considering this provision of the constitution and realizing the difficulty which would be encountered in attempting to reconcile

the many conflicting decisions thereunder, and desiring to avoid the confusion which must arise in construing the new law in the light of such decisions, changed the wording to that embodied in clause "B", thus eliminating the outward form, but retaining the essence; and then in order to render unnecessary any such strained construction as had been placed upon the provisions of the compensation acts they added clause "C", thus forming the basis for the enactment of a law very simple, comprehensive and easy of application. Had the legislature not complicated the situation by including the words of clause "A", we believe the practical application of the law would have been greatly simplified.

Our purpose in thus attempting an analysis of the Act is to make clear to Your Honors our view that it is not necessary to a just determination of this case to try and reconcile its facts and circumstances with those presented by the numerous compensation cases, and to attempt to determine therefrom whether or not the accident which caused the death of defendant in error's intestate arose out of and in the course of his occupation and employment. The cases are numerous. The propositions of law advanced by plaintiff in error are supported by many of them. But we do not believe that those so advanced are applicable to the case at bar under a proper construction of the Arizona Employers' Liability Act.

In the first place we do not agree with counsel concerning the conclusions to be drawn from the evidence as disclosed by the record. To specify:

(1.) That no recovery can be had because deceased "stepped aside" to build the fire.

(2.) That deceased was not at the time of the accident in the employ of plaintiff in error.

(3.) That deceased built the fire in disobedience of instructions.

(4.) That because the danger from explosives was one threatening anyone who might come upon the premises, it was not one inherent in deceased's occupation.

(5.) That there is no showing that deceased was injured by an explosion of powder.

(6.) That no one ever had knowledge of any instance where any unused portion of explosive had not been returned to the powder house.

There is ample authority to sustain the instruction of the trial court that deceased had entered upon the employment when he reached the employers' premises even though he arrived a few minutes before the time to commence work. See the cases noted in Bradbury's Workmen's Compensation Law, 2nd Edition, Vol 1. p. 419 et seq. Also see City of Milwaukee vs. Althoff, 145 N. W. 238, 4 Neg. & Com. Cases An. 110, and cases therein cited in the annotation thereto, including Brice vs. Edw. Lloyd, Ltd., 2 B. W. C. C. 26. Gane vs. Norton Hill Colliery Co., 2 B. W. C. C. 42.

That there is ample evidence to sustain the finding of the jury that the accident arose out of and in the course of such hazardous employment and was due to a condition or conditions of such employment is also apparent from the record. The thing which deceased was doing "in the course of the employment" was holding himself in readiness to go down into the pit when the other shift came out. He was not following a direct "path" to the pit as counsel would have it, but he and his fellow workmen were congregated practically at the point of entry into the pit, within thirty feet thereof. Must they huddle together like sheep or like men in a chain gang rooted to one spot? Are they not allowed

some latitude of movement while thus waiting? We do not think it can be said that the deceased "stepped aside" to build the fire. The act was not the same as if he and his companions were following the path to immediately enter the pit. In such event the act might properly be characterized as a "stepping aside", or an abandonment or interruption of the employment. But here the "course of the employment" was not broken by the deceased. He was still holding himself in readiness. The act he was performing had no more relation to the employment than if he had sat or lain down to rest. What he was doing in the course of his employment was holding himself in readiness subject to the company's orders. So long as he was not doing a prohibited or otherwise negligent act, it ought not to be a bar to recovery. Many cases cited in Bradbury, supra, detail instances of the performance by employes of personal acts during which injuries occurred, for which compensation was allowed. We do not think it can be seriously contended that deceased was violating any rule of the company or doing a prohibited act when he lit the fire. The testimony of the witness Charles W. McHenry was that the defendant company "has no particular rule about lighting fires." (Transcript p. 45).

That deceased's occupation was a hazardous one, and that injury from explosions was a danger inherent in his occupation we think is also apparent from the evidence. The reasoning deduced by plaintiff in error from the decision in the case of Arizona Eastern R. Co. vs. Matthews, supra, cannot be applicable to the facts here. In that case Matthews was not engaged at any time in a hazardous employment and so the danger with which he was threatened was not inherent in his occupation. Therefore it was common to him and all other people in the same situation. He encountered it at his peril subject only to the condition that injury to him

therefrom must not be produced by the negligence of others. And as he sued under the Employers' Liability Act where negligenec of his employer had no place, he could not recover. But such was not the case here. The danger was inherent in the deceased's occupation and bore a distinct relation to him which it could not bear to others outside of the occupation who might come upon the premises.

The plaintiff in error company was engaged in extensive mining operations, using therein large quantities of explosives. No doubt as contended by counsel for plaintiff in error rules were adopted which were intended to prevent accidents from unintended explosions. The men were instructed to return to the powder house when going off shift such surplus powder as had not been used. But it is well known that men become careless and that rules are not always observed. It speaks well for the management that more accidents had not happened at the time of deceased's injury. It is because of likelihood of such accidents where large quantities of explosives are in use that all work necessitating dangerous proximity thereto was declared to be hazardous by the Act. That in order to bring himself within its protection a workman must have been actually handling and working with the explosive at the time would be to destroy and nullify its purpase. In many cases of injury from explosives the workman is not aware of its presence. An unexploded charge is unexpectedly encountered or a stick may have been left lying about by another workman unknown to him. Of course in the instant case it cannot be said with certainty how the explosive which caused deceased's injury happened to be at the particular spot where the accident occurred. But that there was ample opportunity therefor under all the facts and circumstances as disclosed by the evidence, there can be no doupt. The witness McHenry,

plaintiff in error's mine foreman, after detailing the practice prescribed for the handling of the explosives, said, "There are times when men have powder left over; unless the men return the powder left over to the powder house, I do not know what they might do; it is possible that some powder left over might not be returned to the powder house; it is done." (Transcript p. 47). This was one of the "conditions of the occupation" in which the deceased was engaged—working for a mining company using large quantities of explosives entrusted to fellow employes who did not always return the surplus powder so entrusted to their care to the powder house when going off shift. It is not for the defendant in error to prove how the powder came to be where it was when the accident happened. It is only for him to show the "conditions of his occupation" and that by reason of such conditions and the nature of his occupation in relation thereto he was exposed to the peculiar danger declared by the Act to be inherent in such occupation. Possibly the powder was not purposely placed where it was when it exploded—perhaps it was accidentally dropped there—but that it was powder and of the kind used by the plaintiff in error company we think the evidence sufficiently shows. That it did explode and kill the deceased is beyond question. The witness Delgado testified: "There was some powder under some wood and the deceased didn't know that there was any powder there and lit some papers there. The powder was under the fire. * * * I used powder in working in the mine * * * The powder used by the men belonged to the New Cornelia Copper Company." (Transcript p. 41).

And to sum up let us see if the facts and circumstances disclosed by the evidence bring the deceased within the rules laid down in Bryant vs. Fissel, Craske vs. Wigan, and Plumb vs. Cobden Flour Mills Co., supra.

First. Did his injury result from a risk reasonably incidental to the employment? We think we have shown this to be the case from the conditions under which the powder was used and handled. And further that such a risk is reasonably incidental to any employment where explosives are used.

Second. Did the injury occur while the deceased was doing what a man employed as he was might reasonably do at the time, and while he was at a place where he might reasonably be during that time? The jury has answered this question in the affirmative under instructions given by the trial court bearing upon the question of deceased's negligence, and there being evidence sufficient to support such finding we do not believe it should be disturbed.

Third. Was the risk of the accident met with by deceased one which might have been contemplated by a reasonable person when entering the employment as incidental to it? What could be more in contemplation by any reasonable person entering an employment where explosives were used as extensively as the evidence shows them to have been used in this case than that such an accident might be met with as incidental to the employment?

Fourth. Can it be said of the deceased that the accident arose because he was exposed by the nature of his employment to some peculiar danger? This we think must also be answered in the affirmative. The nature of his employment being such as to require the use of and proximity to explosives the peculiarity of the danger incident thereto appear to be plain.

And finally was the accident by which the deceased met his death due to a "condition or conditions of his

occupation''? We think the answers to the four preceding queries are sufficient to determine this question, but to express our idea of the situation more succinctly, we will answer this question by propounding another one. What could be more peculiarly a condition of the occupation of one employed in and about a mine where large quantities of explosives are used than that he at all times while engaged in such occupation incurs the risk of being injured by an accidental explosion? Consequently if such explosion does occur it must necessarily follow that the accident was ''due to'' such condition. The employment being once established, carries with it all the conditions incident thereto. The employer can escape liability only when the accident is caused by the negligence of the injured person. It is not sufficient for such purpose that the injured person's act set in motion the chain of events which produced the injury; it must have been his *negligent* act. The negligence, not the act, must have been the proximate cause of the injury.

We submit that a careful review and consideration of all the facts and circumstances surrounding the death of the defendant in error's intestate, Jose Maria Ochoa, as disclosed by the transcript of the record in this case, bearing in mind that all the witnesses who testified, except the widow of the deceased, were, both at the time of the accident and at the time of the trial in the employ of the plaintiff in error company and naturally reluctant to testify to anything that would be detrimental to their employer's interests, will disclose a case peculiarly within the Arizona Employers' Liability Act and one which that Act was intended to cover. We are not concerned with the question of the constitutionality of the Act or the liability of the plaintiff in error for the injury without its fault; those matters have been disposed of by the Supreme Court of the United States. Suffice it to say

that the liability is not unlimited or left to the caprice of the jury—it must in all cases be a just compensation for the injury sustained and is subject to the regulation of the courts.

Respectfully submitted,

Kibbey Bennett & Jenckes

Of Phoenix, Arizona, Attorneys for
Defendant in Error.